

**Littler's, Inc. and Commercial Workers Local 1001,  
affiliated with United Food and Commercial  
Workers International Union, AFL-CIO. Case  
19-CA-23271**

July 12, 1995

**DECISION AND ORDER**

BY MEMBERS STEPHENS, COHEN, AND  
TRUESDALE

Upon a charge filed by the Union on March 17, 1994, the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing on April 22, 1994, and an amended complaint and notice of hearing on August 24, 1994. The amended complaint alleges that the Respondent engaged in certain unfair labor practices within the meaning of Section 8(a)(5) and (1) of the National Labor Relations Act by failing to make trust contributions on behalf of unit employees as required by the current collective-bargaining agreement between the Respondent and the Union that were due in November and December 1993. Pursuant to the agreement, such trust contributions were due to the Retail Clerks Welfare Trust, Retail Drug Employees Retirement Trust Fund, and Western Employee Benefit Trust-401(k) Plan. The Respondent filed an answer to the complaint, and an amended answer and second amended answer to the amended complaint.

On December 19, 1994, the parties jointly filed a motion to transfer the proceeding to the Board and a stipulation of facts. The parties waived a hearing before an administrative law judge, the findings of fact and conclusions of law by an administrative law judge, and the issuance of an administrative law judge's decision and recommended Order. The parties agreed that the stipulation, with attached exhibits, including the charge, complaint, amended complaint, answer, amended answer, and second amended answer, shall constitute the entire record in this case and that no oral testimony is necessary or desired by any of the parties.

On February 15, 1995, the Board issued its Order approving the stipulation and transferring the proceeding to the Board. Thereafter, the General Counsel filed a brief in support of his position.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the stipulation, the brief, and the entire record in this proceeding and makes the following

**FINDINGS OF FACT**

**I. JURISDICTION**

The Respondent is a State of Washington corporation, with an office and place of business in Seattle,

Washington, where it is engaged in the business of retail merchandising. During the year prior to August 24, 1994, which period is representative of all material times, in the course and conduct of its business operations the Respondent had gross sales of goods and services valued in excess of \$500,000. During the same period, in the course and conduct of its business operations, the Respondent sold and shipped goods or provided services from its facilities within the State of Washington, to customers outside the State, which customers were themselves engaged in interstate commerce by other than indirect means, of a total value in excess of \$50,000. Also during the same period and in the course and conduct of its business operations, the Respondent purchased and caused to be transferred and delivered to its facilities within the State of Washington goods and materials valued in excess of \$50,000 directly from sources outside the State of Washington, or from suppliers within the State of Washington that in turn obtained such goods and materials directly from sources outside the State. The parties stipulated, and we find, that the Respondent has been, at all material times, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The parties stipulated, and we find, that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

**II. THE ALLEGED UNFAIR LABOR PRACTICES**

*A. Facts*

Since at least 1959 and at all material times, the Union has been the designated exclusive collective-bargaining representative of certain of the Respondent's employees included in a unit that constitutes a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.<sup>1</sup> Since 1959 and at all material times, the Respondent has recognized the Union as the exclusive representative of the unit employees and the parties have embodied this recognition in successive collective-bargaining agreements, the most recent effective from August 1, 1992, to August 1, 1995. At all times since about 1959, the Union has been the exclusive collective-bargaining representative of the unit employees within the meaning of Section 9(a) of the Act.

At all material times, David J. Rogers held the position of the Respondent's treasurer, and has been a supervisor within the meaning of Section 2(11) of the Act and is an agent of the Respondent within the meaning of Section 2(13) of the Act. Acting through Rogers, the Respondent failed to make pension and

<sup>1</sup> The unit consists of:

All clothing sales employees, furnishing sales employees, stockpersons, cashiers, displaypersons, alteration employees, excluding all other employees, guards, and supervisors, as defined in the Act.

health and welfare trust contributions on behalf of unit employees for the months of November and December 1993 as required by the current collective-bargaining agreement between the Respondent and the Union. The Respondent failed to make these contributions without affording the Union an opportunity to bargain with the Respondent concerning this conduct relating to hours, wages, and other terms and conditions of employment, and without the Union's consent.

On December 21, 1993, the Respondent filed a bankruptcy petition under Chapter 11 of the Bankruptcy Act.

#### *B. Issues Involved and Contentions of the Parties*

The issues presented here are whether the Respondent violated Section 8(a)(5) of the Act by failing to make trust contributions in November and December 1993 and whether the Respondent's filing of a bankruptcy petition on December 21, 1993, relieved it of its obligations under the collective-bargaining agreement to make contributions to the trusts. The General Counsel contends that an employer violates Section 8(a)(5) when it unilaterally fails to make contractually required contributions to benefit trusts. The General Counsel further contends that economic inability to make such contractually required trust contributions is not a defense to the failure to make such contributions. Accordingly, the General Counsel contends that because there is no dispute that the Respondent failed to make the contractually required trust contributions discussed above, and that the Respondent did not give the Union prior notice, nor an opportunity to bargain about its cessation of payments, the Respondent's actions constitute a violation of Section 8(a)(5) of the Act.

Regarding the issue of whether the Respondent's bankruptcy petition provides a defense to this violation, the General Counsel contends that the filing of the bankruptcy petition does not excuse the failure to make the contractually required trust contributions at issue here.

Although no brief has been received from the Respondent, it denied in its answer, amended answer, and second amended answer that it violated Section 8(a)(5) as alleged. In this regard, although the Respondent admitted that it had failed to make the required trust contributions for November and December 1993, it further stated that it was prohibited from doing so by operation of the Bankruptcy Code.

#### *C. Discussion*

The contractual provisions at issue are mandatory subjects of bargaining. *Crest Litho*, 308 NLRB 108, 109 (1992). As the Board stated in *Abernathy Excavating*, 313 NLRB 68, 68 (1993): "[a] unilateral modification or repudiation of such provisions during a contract term is a violation of Section 8(a)(5)." Because

it is undisputed that the Respondent failed to make the contractually required pension and health and welfare trust contributions for the months of November and December 1993 and that it did so without prior notice to the Union and without affording the Union an opportunity to bargain concerning this conduct relating to hours, wages, and other terms and conditions of employment, and without the Union's consent, we find that the Respondent has violated Section 8(a)(5) as alleged. We further find that the Respondent's unsubstantiated claim, that it was "prohibited" from making the required trust contributions by operation of the Bankruptcy Code, is not a defense to these violations. It is well settled that "[a] bankruptcy proceeding cannot be a defense to [a] [r]espondent's unlawful failure to make timely prepetition payments."<sup>2</sup> For these reasons, we find that the Respondent violated Section 8(a)(5) of the Act by failing to make the contractually required trust contributions for November and December 1993.

#### CONCLUSIONS OF LAW

1. The Respondent, Littler's, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Food and Commercial Workers Local 1001, affiliated with United Food and Commercial Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following is an appropriate unit for purposes of collective bargaining:

All clothing sales employees, furnishing sales employees, stockpersons, cashiers, displaypersons, alteration employees, excluding all other employees, guards and supervisors, as defined in the Act.

4. The Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally, without notice to the Union and without affording the Union an opportunity to bargain, failing to make trust contribution payments in November and December 1993, to the Retail Clerks Welfare Trust, to the Retail Drug Employees Retirement Trust Fund, and to the Western Employees Benefit Trust 401(k), as per direction of employees in the unit.

5. The Respondent's actions constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

<sup>2</sup> *Crest Litho*, 308 NLRB at 109 (footnote omitted). The General Counsel states, and the Respondent does not dispute, that the payments for December were due on December 1 or 2. Thus, the liability for both November and December occurred prior to the filing of the petition.

## THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) by failing to make the contractually required trust contributions, we shall order the Respondent to make whole its unit employees by making all such delinquent contributions, including any additional amounts due the trusts in accordance with *Merryweather Optical Co.*, 240 NLRB 1213 (1979). In addition, the Respondent shall reimburse unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). Interest on all such sums shall be paid in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).<sup>3</sup>

## ORDER

The National Labor Relations Board orders that the Respondent, Littler's, Inc., Seattle, Washington, its officers, agents, successors, and assigns, shall

## 1. Cease and desist from

(a) Refusing to bargain in good faith with the Union as the exclusive collective-bargaining representative of the unit employees by failing and refusing to make contractually required trust contributions.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

## 2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Adhere to the terms of the 1992-1995 collective-bargaining agreement with the Union.

(b) Remit the delinquent trust contributions, including any additional amounts due the funds, and reimburse the unit employees for any expenses ensuing from the Respondent's failure to make the required payments, in the manner set forth in the remedy section of the decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

<sup>3</sup> To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

(d) Post at its facility in Seattle, Washington, copies of the attached notice marked "Appendix."<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

<sup>4</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

## NOTICE TO EMPLOYEES

## POSTED BY ORDER OF THE

## NATIONAL LABOR RELATIONS BOARD

## An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain in good faith with United Food and Commercial Workers Local 1001, affiliated with United Food and Commercial Workers International Union, AFL-CIO as the exclusive collective-bargaining representative of an appropriate bargaining unit of our employees, by failing to adhere to provisions of the August 1, 1992, to August 1, 1995 collective-bargaining agreement with the Union requiring us to make contributions to the Retail Clerks Welfare Trust, the Retail Drug Employees Retirement Trust Fund, and the Western Employees Benefit Trust-401(k).

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL adhere to the terms and conditions of employment of our collective-bargaining agreement with the Union.

WE WILL make whole unit employees and the contractual benefit funds for any losses resulting from our failure to comply with provisions in the 1992-1995 collective-bargaining agreement with the Union.

LITTLER'S, INC.